2004 WL 6084503 (Me.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Maine.
Kennebec County

Danielle HARTIGAN, Plaintiff,
v.
Hall-Dale MANOR, d/b/a North Country Residential Care Associates and North Country Residential Care, Inc., Defendant.

No. CV03202.
June 17, 2004.

Motion for Summary Judgment and Incorporated Memorandum

James R. Erwin, Bar No: 1856, Pierce Atwood, One Monument Square, Portland, Maine 04101, 207-791-1000, Counsel for Defendant, Hall-Dale Manor.

INTRODUCTION

Defendant Hall-Dale Manor hereby moves for summary judgment on both counts of the complaint. Based on the facts set forth in the accompanying Statement of Material Facts and accompanying documents, and on the law that applies to Plaintiffs claims, there are no genuine issues of material fact and Defendant is entitled to judgment as a matter of law.

Plaintiff Danielle Hartigan seeks to recover from her former employer, Hall-Dale Manor, [1] for retaliation under the Maine Whistleblower Protection Act, 26 M.R.S.A. § 831 et seq. ("WPA") (Count I), and also for defamation (Count II). First, Hartigan cannot show a violation of the WPA because she cannot show any causal relationship between her termination and the protected activity in which she says she engaged. Second, Hartigan cannot satisfy the elements of defamation for either of the statements she claims to have been defamatory. The first statement, which is a written memorandum detailing the reasons for her termination, was never published. The second statement, submitted by Hall-Dale Manor's attorney to the Maine Human Rights Commission in response to her charge of discrimination, cannot be the basis for a defamation claim because it is absolutely privileged.

FACTS

The facts are set forth in detail in the Statement of Material Facts and accompanying affidavits, depositions and exhibits filed herewith. Following is a summary of the key facts relating to this motion.

Hall-Dale Manor is a residential care facility in Farmingdale, Maine owned and operated by North Country Residential Care Associates ("NCRCA"). Hartigan was employed there as Activities Director from March 2001 until August 8, 2001. Hartigan was terminated on August 8 for multiple reasons, the most important of which were the breach of confidentiality and failure to supervise residents' safety. Specifically, a Hall-Dale employee named Debbie Grant complained that on July 26, 2001, Hartigan had engaged in improper treatment of residents of the facility by refusing a resident's request to stop when they were traveling so that the resident could use the bathroom. The resident soiled his pants and remained in soiled pants for another hour before arriving back at the facility. Also, Grant complained that on August 2, 2001, Hartigan had left several residents unsupervised on an outing to Old Orchard Beach, resulting in one resident falling and hitting her head on a wooden pier. On or about August

5, 2001, Bernard Davis, the General Partner of NCRCA, received a complaint from an employee of another residential care facility that Hartigan had been discussing confidential information about Hall-Dale residents at the other facility.

Hall-Dale Manor immediately initiated an investigation into the complaints against Hartigan. Chad Cloutier, who began working for NCRCA on August 6, began his job by conducting the investigation. Cloutier concluded from this investigation that Hartigan in fact failed to supervise residents, and had also violated company policy by discussing confidential information about Hall-Dale Manor residents with employees of Walter's Boarding Home, where Hartigan also worked part-time. Cloutier decided to terminate Hartigan, which he did on August 8, for these and other reasons. He also decided to terminate two other Hall-Dale Manor employees for similar breaches of confidentiality.

Hartigan claims she was terminated for telling her supervisors she would “go to the State” about issues relating to residents' rights. Even assuming Hartigan made such a statement, however, Cloutier had no knowledge of either Hartigan's purported concerns about residents' rights or her alleged threat to raise them with the State. Hartigan filed a charge with the Maine Human Rights Commission alleging whistleblower retaliation. The Commission investigation found no reasonable grounds to support that claim.

Hartigan also claims she was defamed both by the memorandum she was given setting forth the reasons for her termination and by Hall-Dale Manor's submission to the Maine Human Rights Commission. Cloutier gave Hartigan the termination memorandum when he terminated her employment, but did not give it to anyone else. Cloutier submitted the position statement to the Commission in his capacity as Hall-Dale Manor's attorney, but did not otherwise disseminate it.

ARGUMENT

I. Hall-Dale Manor is entitled to summary judgment on Count I because Hartigan cannot show any causal connection between her termination and what she claims was protected activity.

Hartigan's first claim is that she was the victim of retaliation proscribed by the WPA.

The pertinent section of the WPA provides that:
1. Discrimination prohibited. No employer may discharge, threaten or otherwise discriminate against an employee regarding an employee's compensation, terms, conditions, location or privileges of employment because:

A. The employee, acting in good faith, or a person acting on behalf of the employee, reports orally or in writing to the employer or a public body what the employee has a reasonable cause to believe is a violation of a law or rule adopted under the laws of this State, a political subdivision of this State or the United States...

26 M.R.S.A. § 833(1)(A) (2003).

To establish a prima facie case under the WPA, Hartigan must thus prove that:
(1) she engaged in activity protected by the Act,

(2) she was the subject of adverse employment action, and

(3) there was a causal link between the protected activity and the adverse employment action.

Smith v. Heritage Salmon, Inc., 180 F.Supp.2d 208, 216 (D. Me. 2002). In analyzing claims under the WPA, Maine courts have adopted the familiar three-part burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792

(1973). *See Bishop v. Bell Atlantic Corp.*, 299 F.3d 53, 58 (1st Cir. 2002). Under this standard, Hartigan must first establish a prima facie case of retaliation, namely that she engaged in activity protected by the WPA, that she was the subject of adverse employment action, and that there was a causal link between the protected activity and the adverse employment action. *Id.* If Hartigan can meet the minimum burden of establishing a prima facie case of discrimination, the evidentiary burden shifts to Hall-Dale to establish that it had a legitimate, non-retaliatory reason for terminating Hartigan. *Id.* Finally, the burden shifts back to Hartigan, who must establish that Hall-Dale's stated reasons for the termination are pretextual, and that its real motive was in fact retaliatory. *Id. See also Dicentes v. Michaud*, 1998 ME 509, ¶ 14.

Hall-Dale Manor concedes for purposes of this motion that Hartigan would satisfy the very low initial burden of production for establishing a prima facie case. [2] On this record, it is clear that Hall-Dale Manor also meets its burden to articulate a legitimate, non-discriminatory reason for Hartigan's termination. The record is clear that the proffered reasons for her termination are as described by Chad Cloutier in his affidavit and also in the memorandum he presented to Hartigan at the time of her termination: breach of confidentiality, inattention to resident safety, insubordination, foul language, misuse of company time. It is important to note that Hall-Dale Manor has no duty to demonstrate that Hartigan actually engaged in misconduct; its burden is only to adduce some evidence that it had a legitimate basis for believing that the misconduct occurred. *See Lenoir v. Roll Coater, Inc.*, 13 F.3d 1130, 1133-34 (7th Cir. 1994); *Cooper v. Diversicare Management Services*, 115 F. Supp.2d 1311, 1319-20 (M.D. Ala. 1999).

At this point the burden-shifting exercise concludes, and the Court is left to consider whether Hartigan can meet her ultimate burden of proof on the issues of pretext and retaliatory motive, which under the WPA is embodied in the third element - the causal link. Hartigan must be able to establish by admissible evidence that Hall-Dale's proffered reason for terminating her is phony, and that it was actually was motivated by retaliatory animus. *Smith v. Heritage Salmon, Inc.*, 180 F. Supp. at 218. Based on all of the undisputed facts, there is ample evidence that Chad Cloutier, the sole decision-maker on behalf of Hall-Dale Manor, had a genuine belief that Hartigan engaged in problematic conduct, and there is simply no evidence of a retaliatory motive. Thus Hartigan cannot demonstrate a causal link between her alleged protected activity and her termination, and her claim must fail.

The only protected activity Hartigan identifies in support of her claim is her report to Rose Pickell and Kim Colby of the issues discussed at the July 29 resident council meeting, including her statement that she would "go to the State" about the issues. [3] She claims that Hall-Dale Manor terminated her because of that report and the accompanying "threat." She has no evidence, however, that the person who made the decision to terminate her, Chad Cloutier, had any knowledge of any facts whatsoever relating to that report or threat. The only evidence on Cloutier's state of mind is this: he had just been hired, he was told to investigate reports of breaches of confidentiality and patient safety, he did so and decided on his own to terminate several employees - not just Hartigan, but also Joe Raymond and Nicole Mullins - for breaches of confidentiality and, in Hartigan's case, other transgressions as well. Throughout this process, he was unaware there even was an resident council meeting, or that Hartigan attended it, or that she reported on it to her superiors (one of whom Cloutier also suspended), or what the nature of her report was, or that she had said she would "go to the State."

In short, there is no evidence that Cloutier even *could* have been motivated by a retaliatory animus, let alone that he actually *was*, for he did not even know about the conduct on which he now stands accused of basing the termination. For this reason, Hartigan's claim must fail because there is simply no evidence that Hall-Dale Manor's articulated reason for her termination is a pretext for retaliation.

Hartigan will likely rely on the fact that Cloutier did not interview her as part of its investigation into the complaints against her, and argue that the investigation was otherwise "faulty," as evidence of pretext. The First Circuit, however, has recently held that the fact that the employer did not interview the plaintiff before termination does not amount to pretext. *See Rivera-Aponte v. Restaurant Metropol #3*, 338 F.3d 9, 11 (1st Cir. 2003). *See also Thomas v. The Habitat Co.*, 213 F. Supp. 2d 887 (N.D. Ill. 2002) ("Ms. Brown says that Habitat never asked for her side of the story before firing her, but the pretext inquiry does not concern the fairness of the employer's decision; what matters is whether the stated reasons for termination were honest").

In Rivera-Aponte, the employer terminated the plaintiff for workplace violence "based on one interview and Nogueras' actual (and undisputed) injuries, that Rivera was the aggressor." *Id.* The Court found for the employer even though the employer did not interview the plaintiff because "(w)hether a termination decision was wise or done in haste is irrelevant, so long as the decision was not made with discriminatory animus." *Id. See also Smith v. Heritage Salmon, Inc.,* 180 F. Supp. 2d at 218) ("the issue in assessing pretext in a McDonnell-Douglas burden-shifting case is not whether the reason for firing Plaintiffs was real, but rather whether defendant *believed* it was real").

Thus, the fact that Hall-Dale Manor may not have done a perfect or thorough investigation of the claims against Hartigan is insufficient as a matter of law to establish pretext. *See Lenoir,* 13 F.3d at 1134 ("Viewing the record most favorably to Plaintiff, she may have established that Roll Coater's investigation may have lead to an incorrect result, but she has not presented anything from which a trier of fact could find that her race played a part in the decision to fire her"); *Bullington v. United Air Lines, Inc.,* 186 F.3d 1301, 1318 (10th Cir. 1999) ("the relevant inquiry is not whether United's proffered reasons were wise, fair or correct, but whether United honestly believed those reasons and acted in god faith upon those beliefs"); *Worster v. U.S. Postal Service,* 132 F. Supp. 2d 397, (M.D.N.C. 2001) (plaintiff must offer more than her own opinion that decision to terminate her was not based on the threats of violence she made); *May v. M& M/Mars,* 1996 WL 374121 (N.D. Ill. 1996) ("The issue of pretext does not address the correctness or desirability of reasons offered for an employer's decision. Rather, the issue is whether the employer could have *reasonably believed* that the Plaintiff was guilty of the offenses charged"); *Flowers v. Goldman, Sachs & Co.,* 1994 WL 605753, *3 (N.D. Ill. 1994) ("evidence of error does not demonstrate that a proffered explanation is pretextual"). Courts will not "sit as a super-personnel department that reexamines an entity's business decisions." *See Kariotis v. Navistar International Transportation Corp.,* 131 F.3d 672, 678 (7th Cir. 1997) ("No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the laws barring discrimination do not interfere").

Furthermore, Hartigan cannot show that she was treated differently from other similarly situated employees because she was not the only employee terminated or disciplined as a result of the investigation. *See Straughn v. Delta Air Lines, Inc.,* 250 F.3d 23 (1st Cir. 2001) (pretext may be established by "differential treatment in the workplace"). In fact, Cloutier learned that two other employees had also breached confidentiality, resulting in his decision to terminate Raymond and Mullins as well. Indeed, they were terminated for only one offense, while Hartigan was involved multiple transgressions.

II. Hall-Dale Manor is entitled to summary judgment on Count II because Hartigan cannot establish the elements of defamation for either of the statements she claims to be defamatory.

To make out a prima facie case of defamation, Hartigan must prove each of the following elements of common law defamation:
(a) a false and defamatory statement concerning another;

(b) an unprivileged publication to a third party;

(c) fault amounting at least to negligence on the part of the publisher; and

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Norris v. Bangor Publ'g Co., 53 F. Supp. 2d 495, 502 (D. Maine 1999) (citing *Lester v. Powers,* 596 A.2d 65, 69 (Me. 1991) (adopting Restatement (Second) of Torts § 558 (1977)). *See generally* J. Simmons *et al.*, Maine Tort Law § 13.03 (2001) ("Defamation law is a curious mixture.... The Maine Legislature has in large part left development of the cause of action to the courts.").

For the reasons that follow, Hartigan cannot establish all the elements of defamation for either of statements on which she bases her claim.

A. The memorandum summarizing the reasons for her termination was never published.

Hall-Dale Manor first addresses Hartigan's claim that Chad Cloutier's memorandum summarizing the reasons for her termination was defamatory. That claim fails because Hartigan cannot establish the element of publication. [4] Under Maine law, a libel is published when a defendant knows or should know that he or she is communicating a defamatory statement to a third party. *Hill v. Town of Lubec*, 609 A.2d 699, 701-702 (Me. 1992). *See* Restatement (Second) of Torts § 577 (1977) ("publication of defamatory matter is its communication... to one other than the *person defamed*") (emphasis added) and comment b thereto. The statement was simply never published to a third party. The only communication of that statement was by Cloutier to Hartigan herself, on the day he told her she was terminated. Thus, as a matter of law, Hartigan cannot prove the second element of her claim, and Hall-Dale Manor is entitled to summary judgment with respect to this statement.

Moreover, Maine law requires employers, when requested, to provide reasons for termination in writing. 26 M.R.S.A. § 630. The public policy underlying this obligation embodies the requirement under common law defamation that the element of publication be to some one other than the person claiming to have been defamed.

B. Hall-Dale Manor's submission to the Maine Human Rights Commission is privileged because an attorney is privileged to publish even defamatory statements concerning another in an administrative, quasi-judicial proceeding.

The second statement on which Hartigan bases her defamation claim is absolutely privileged and therefore cannot support the claim as a matter of law. The Law Court has held that an attorney's statements in pleadings relevant to the subject of the action are absolutely privileged. *Dineen v. Daughan*, 381 A.2d 663, 664 (Me. 1978). While the Law Court has not specifically addressed whether the absolute privilege attaches to communications made during proceedings before the Maine Human Rights Commission, *see Hamilton v. Greenleaf* 677 A.2d 525, 528 (Me. 1996), the United States District Court for the District of Maine has addressed this precise issue. In *LaPlante v, United Parcel Service, Inc.*, 810 F. Supp. 19 (D. Me. 1993), Judge Hornby held that the privilege for statements made in judicial proceedings applies with equal force before the Maine Human Rights Commission. Thus, statements in the respondent's submission to the Commission were absolutely privileged. *Id.*, 810 F. Supp. at 20-21.

If this privilege applies to statements made in litigation, that would be enough, as Judge Hornby concluded, to make Cloutier's letter to the Human Rights Commission absolutely privileged as well. However, the privilege applies beyond the context of pending proceedings. The Restatement recognizes that the same absolute privilege that applies in litigation must necessarily apply to relevant communications preliminary to the initiation of suit in order to meet the same concern that the privilege is intended to serve during litigation. Section 586 of the Restatement (Second) of Torts sets forth the full scope of an attorney's absolute privilege to make statements concerning not only pending, but also threatened, litigation:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

There is an obvious and well-recognized public policy behind the absolute privilege for an attorney's communication relating to threatened litigation. Comment a to section 586 sets forth the rationale:

> The privilege stated in this Section is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients. Therefore the privilege is absolute. It protects the attorney from liability in an action for defamation irrespective of his purpose in

> publishing the defamatory matter, his belief in its truth, or even his knowledge of its falsity. These matters are of importance only in determining the amenability of the attorney to the disciplinary power of the court of which he is an officer. The publication of defamatory matter by an attorney is protected not only when made in the institution of the proceedings or in the conduct of litigation before a judicial tribunal, but in conferences and other communications preliminary to the proceeding.

Restatement (Second) of Torts § 586 cmt. a. The Law Court recognized the same rationale in *Dineen*, 381 A.2d at 664 ("Just as a witness needs the freedom to be able to answer questions posed, free of any concern except the truth as he believes it to be, an attorney must be free to assert relevant statements to pursue fully the interests of his client").

The Law Court has adopted the Restatement's positions regarding defamation generally. *See, e.g., Staples v. Bangor Hydro-Electric*, 629 A.2d 601, 604 (Me. 1993); *True v. Ladner*, 513 A.2d 257, 261-62 (Me. 1986); *Tanguay v. Asen*, 722 A.2d 49 (Me. 1998) (attorney's alleged defamatory statement fell within privilege of counsel to inquire and develop evidence relevant to the proceeding, whether viewed as a qualified or absolute privilege). *See also LaPlante*, 810 F. Supp. at 21 n.4 (noting the Law Court's implicit adoption of certain of the Restatement's privileges). If presented with this specific question, the Law Court would similarly recognize the applicability of an absolute privilege in this instance because an attorney must be able to raise all possible defenses in an administrative proceeding just a much as in formal litigation or settlement discussions — even those the plaintiff may find offensive — in order to facilitate the exchange of information between potential parties and fully represent his or her client's interests. Restatement (Second) of Torts § 586.

Here, Cloutier was simply advocating for his client in a tribunal having at least a quasi-judicial function – precisely the context in which the absolute privilege afforded attorneys and witnesses is meant to apply. The Court should take the inevitable step Maine law requires, and follow Judge Hornby's rationale in *LaPlante.* Cloutie's submission to the Maine Human Rights Commission is absolutely privileged, and Hall-Dale Manor is entitled to summary judgment with respect to any claim that depends on statements made in that submission.

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment for Defendant Hall-Dale Manor on both counts of the complaint.

Dated: June *17*, 2004

Footnotes

1 Hall-Dale Manor is the operating name of a residential care facility owned and operated by a North Country Residential Care Associates, a Maine limited partnership.

2 As to the first element, while Hall-Dale Manor does not concede that Hartigan engaged in any protected activity, it is not necessary to reach that issue in order to rule on this motion. As to the second element, there is no question that Hartigan suffered an adverse employment action: she was terminated from her job at Hall-Dale Manor on August 8, 2001. As to the third element, her termination occurred close enough in time to her alleged protected activity to permit an initial inference that the two were related.

3 Hartigan did not report anything to DHS until after her termination, despite the fact that she was a "mandatory reporter," and was trained at Hall-Dale Manor as such, under chapter 113, rule 5.25 of the Department of Human Services rules, which provides as follows:

5.25 Mandatory report of rights violations. Any person or professional who provides health care, social services or mental health services or who administers a long term care facility or program who believes that the regulations pertaining to residents' rights or the conduct of resident care have been violated, shall report the alleged violation to the Department of Human Services ((800) 383-2441)) and to one or more of the following:

Disability Rights Center (DRC), pursuant to Title 5 M.R.S.A. § 19501 through § 19508 for incidents involving persons with mental illness; the Long Term Care Ombudsman Program, pursuant to Title 22 M.R.S.A. § 5107-A for incidents involving **elderly** persons; the Office of Advocacy, pursuant to Title 34-B M.R.S.A. § 1205 for incidents involving persons with mental retardation; or Adult Protective Services, pursuant to Title 22 M.R.S.A. § 3470 through § 3487.

Reporting suspected **abuse**, neglect and exploitation is mandatory in all cases. Documentation shall be maintained in the facility that a report has been made.

Mandated reporters shall contact the Department of Human Services ((800) 383-2441) within one (1) working day of receiving and/or obtaining information about any rights violations. [*Class IV*]

4 For purposes of this motion, Hall-Dall Manor assumes a genuine issue of material fact as to the other elements, but does not concede any of those elements and would contest some or all of them in the event of a trial.

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